IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1950

No. 329

AMALGAMATED ASSOCIATION OF STREET, ELECTRIC RAILWAY AND MOTOR COACH EMPLOYEES OF AMERICA, DIVISION 998, et al.,

Petitioners,

vs.

WISCONSIN EMPLOYMENT RELATIONS BOARD,

Respondents.

No. 330

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On Writ of Certiorari to the Supreme Court of the State of Wisconsin

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BRIEF OF AMERICAN FEDERATION OF LABOR, AMICUS CURIAE

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STATEMENT

The American Federation of Labor, as representative of some eight million workers, is vitally interested in the

issues presented in these cases. One of the principal purposes for which labor organizations are formed is to promote and improve the economic welfare of workers through the process of collective bargaining. The process of collective bargaining has been developed principally through the efforts of organized labor. By this process employees seek to obtain from employers satisfactory wages and conditions of employment.

In the briefs filed by petitioners it is well demonstrated that the Wisconsin Statutes here involved (Sections 111.50-111.65) on their face and as applied in the two cases presently before this Court must be held invalid for the reasons stated in their briefs. We concur in their reasons and urge their validity without burdening this Court with a repetition of them. We should like, however, to call attention, expressly, to the views of the American Federation of Labor that real collective bargaining, as contemplated by settled public policy and the course of Federal legislation is effectively destroyed by the Wisconsin Statutes just mentioned, which prohibit strikes by employees of public utility employers when such strikes will result in an interruption of an essential service and require their employees to submit disputes regarding contract terms to arbitration and to be bound by the results of such arbitration for a year.

The right of collective bargaining necessarily includes the right to engage in peaceful and lawful strikes and to take lawful economic action. There can be no true and realistic collective bargaining unless these two interrelated rights are protected. Such a strike is "a lawful instrument in a lawful economic struggle or competition between employer and employees."[1] Hence, the right to engage in peaceful and lawful strikes as a concomitant of collective bargaining was recognized and protected in the Wagner Act of 1935 and the Labor-Management Relations Act of

[1] *American Steel Foundries v. Tri-City Central Trade and Labor Council*, 257 U. S. 196.

1947. In referring to collective bargaining, we at all times include the necessary element of the collective bargaining process embraced in the right to resort to peaceful economic action.

Compulsory arbitration is the antithesis and complete negative of collective bargaining. The one cannot exist side by side with the other. They cannot be applied concurrently, nor, as a practical matter, can genuine collective bargaining be conducted preliminarily to final compulsory arbitration.

Federal legislation has established public policy to encourage and protect the process of collective bargaining culminating in the National Labor Relations Act of 1935,[2] superseded by the Labor-Management Relations Act, 1947,[3] which act makes it the specific right and obligation under Federal law of employers and the properly chosen representatives of their employees, to bargain collectively in good faith. As shown in the briefs of the petitioners, this law is applicable to public utility employers and employees.

The inherent conflict between collective bargaining and compulsory arbitration has been pointed out by William Green, President of the American Federation of Labor before the Committee on Labor and Public Welfare of the United States Senate, February 18, 1947, where he said:

> "Industrial peace will not be secured by the establishment of labor courts or by compulsory arbitration. Maintenance of enduring industrial peace rests upon the full acceptance of free collective bargaining.
>
> "Compulsion can force the parties to submit to a procedure. It may temporarily force an unwilling acceptance of the results. But forced obedience generates resistance. It is therefore a source of further conflict. Obedience, exacted by compulsion, can never be a substitute for agreement.
>
> "While the interests of labor and management on

[2] 49 Stat. 449, 29 U.S.C., Sec. 151, et seq.
[3] Public Law 101, 80th Congress.

specific issues may often be divergent, these differences are overshadowed by a common interest in greater and more efficient production which alone can yield better profits and better wages and at the same time contribute to a higher standard of living of the whole community. Labor and management are not natural adversaries. The very essence of their collective bargaining relationship is agreement. Voluntary arbitration is the outgrowth of the necessity to maintain agreement. For voluntary arbitration is based on agreement; it derives its force and effectiveness from the agreement of the parties and from no other source.

"Every step of compulsory arbitration is in the direction opposite to voluntary arbitration. The two procedures are fundamentally opposed to each other. Introduction of compulsory arbitration will therefore promptly and completely destroy the voluntary arbitration machinery through which peaceful, friendly and cooperative relations have been built up by labor and management over a period of years."[4]

The experience of the American Federation of Labor is further reflected in a statement of Boris Shishkin. Economist, who said with reference to compulsory arbitration in the American Federationist of February, 1947:

"It kills collective bargaining and replaces it with litigation.

"Compulsory arbitration stunts the growth of genuine collective bargaining as a means of building up agreement a set of standards and relationships between workers and their employers. The purpose of collective bargaining is agreement. Without agreement there cannot be harmony. Compulsory arbitration rejects agreement and relies on sheer obedience instead for maintaining peace. In its very nature it is degrading. Like all institutions, it would tend to be self-perpetuating. And as such, it would thrive on strife and discord. Putting a premium on litigation, it would become a paradise for lawyers and a hell for

[4] William Green, President, American Federation of Labor, Senate Hearings, Part 2, p. 1018, February 18, 1947.

workers and employers who must produce and do the work."[5]

The basic conflict existing between collective bargaining and compulsory arbitration is likewise recognized by the representatives of industry. Illustrative of the viewpoint of the representatives of industry is the following from "Compulsory Arbitration Opposed, Department of Manufacture, Chamber of Commerce of the United States, 1947, page 8":

> "Free collective bargaining would fall into disuse under any system of compulsory arbitration. Our present system of reaching voluntary labor-management agreements on terms and conditions of employment through free, voluntary collective bargaining would be virtually supplanted by imposed settlements.
>
> "Collective bargaining may be conceived of as a 'way of life' for employees and management to follow in their daily contacts and problems, as well as in settling disputes and arriving periodically at contracts embodying the terms under which the employees will work. The terms and conditions of employment decided by this process are those mutually agreed on by the parties. They have not been imposed by an outside body. Therefore, in the long run, they are far more satisfactory to both employer and employees than a system whereby each must accept the fiat of a governmental agency or other arbitration tribunal. Each side is far more likely to abide by decisions reached by mutual agreement than to adhere willingly and in good spirit to arbitration awards which may not in fact meet with their approval."

A similar view was expressed by Ira Mosher, formerly President of the National Association of Manufactures in a statement presented to the Senate Committee on Labor and Public Welfare, February 15, 1947, as follows:

"We know by experience that if we provide for com-

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[5] The Case Against Compulsory Arbitration, American Federationist, February 1947, by Boris Shishkin.

pulsory arbitration the incentive to bargain collectively is destroyed. One side or the other or both may decide that since the board or court will make the final decision anyway there is not much use in their bargaining in good faith. More than that, each side will be wary of making any concessions, because such concessions would then become the starting point from which the courts or board would make its decision."[6]

Clearly pointing out the existing conflict, George W. Taylor, formerly Chairman of the War Labor Board, said:

"Those favoring compulsory arbitration of public emergency disputes would scrap collective bargaining in that one area. The meeting-of-minds criterion of fairness and equity would be supplanted under a system in which a government agency decides employment terms for employees and employers alike.

"Nor can these comments be effectively rebutted by insisting that compulsory arbitration would become operative only if the parties failed to agree. Theoretically, avoidance of compulsory arbitration might even be looked upon as an inducer of agreements which serves the same function as a strike in collective bargaining. The evidence strongly indicates, however, that the mere provision for ultimate compulsory arbitration in itself discourages the making of those offers and counter offers without which there is no negotiation. Why should the employer make any offer which the union can use not as a starting point for agreement but as a springboard for arbitration? Why should the union accept any employer offer when, in compulsory arbitration, it would not likely get less and might get more? Why shouldn't a union make and hold to a large number of so-called fringe demands? If they are dismissed in arbitration, nothing has been lost. If they are approved, much has been gained. Negotiating tactics are entirely different when compulsory arbi-

[6] "Should the Federal Government Require Arbitration of Labor Disputes in all Basic American Industries?"; statement presented by Ira Mosher to the Senate Committee on Labor and Public Welfare, February 15, 1947; quoted in the Congressional Digest, August-September, 1947, p. 219.

tration and not a strike is the last step. The reason: Under collective bargaining a dispute can only be settled by a meeting of minds; in compulsory arbitration this criterion is supplanted."[7]

The unanimity of opposition to compulsory arbitration arising largely from experience was apparent during the President's Joint Labor-Management Conference in 1945, which adopted the statement that "Nothing in this report is intended in any way to recommend compulsory arbitration, that is, arbitration not voluntarily agreed to by the parties."[8] This attitude is further emphasized by the fact that among all the Taft-Hartley Act witnesses, whose testimony filled ten volumes of hearings before the Senate Committee on Labor and Public Welfare and the House Committee on Education and Labor, no management or union representative urged that arbitration be made compulsory.[9]

For a fuller discussion of the economic issues involved in compulsory arbitration, the following references are cited.[10]

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[7] "Is Compulsory Arbitration Inevitable," George W. Taylor, reprinted in Congressional Record with foreword by Senator Paul H. Douglas of Illinois, February 10, 1949, U. S. Government Printing Office, pp. 4-5.

[8] Statement adopted by the President's National Labor-Management Conference, November 29, 1945. Reference: The President's National Labor Management Conference, U. S. Department of Labor, 1946, p. 47.

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Petitioner's brief in Number 329 points out at length the fact that Congress, by the Labor-Management Relations Act, has completely occupied the field of peaceful strikes for higher wages in industries affecting interstate commerce and has shown that, in any event, there is such conflict between the Federal statute and the Wisconsin Act that the two cannot stand side by side.

With respect to the latter, petitioner's brief emphasizes that the absolute prohibition of the right to strike in support of collective bargaining is in conflict with the entire concept of the collective bargaining process protected and nurtured by the National Labor Relations Act.

Without the right to withhold service, to engage in a strike or concerted cessation of work, when negotiations, persuasion and argument are met with a deaf ear on the part of an employer or perhaps a complete and arbitrary refusal to negotiate and bargain, collective bargaining would not be worthy of the name. The right to bargain collectively would be stripped of all substance and in its place would rise collective submission to unilaterally dictated conditions of employment. As said by Chief Justice Taft in the case of *American Steel Foundries v. Tri-City Central Trades and Labor Council*, 257 U. S. 184:

> "A single employee was helpless in dealing with an employer. He was dependent ordinarily on his daily wage for the maintenance of himself and family. If the employer refused to pay him the wages that he thought fair, he was nevertheless unable to leave the employ and to resist arbitrary and unfair treatment. Union was essential to give laborers an opportunity to deal on equality with their employer. They united to exert influence upon him and to leave him in a body in order by this inconvenience to induce him to make better terms with them. They were withholding their labor of economic value to make him pay what they thought it was worth. The right to a combine for such a lawful purpose has in many years not been denied

> by any court. The strike became a lawful instrument in a lawful economic struggle or competition between employer and employees as to the share or division between them of the joint product of labor and capital." (257 U. S., at 196).

Similarly, in Number 330 petitioner has clearly shown by the same reasoning and authorities that the compulsory arbitration provisions of the Wisconsin Act stand on no better footing than the anti-strike provisions and must likewise fall. We are in full accord with the contentions and arguments advanced by petitioners. The principles applied in the Hill case,[11] LaCrosse Telephone Company case,[12] and the O'Brien case,[13] require the invalidation of the Wisconsin statute involved here.

Obviously, the system of compulsory arbitration and absolute prohibition of strikes provided in the Wisconsin statute is the very antithesis of collective bargaining and of the Federal policy to promote collective bargaining. Because of this conflict with the Federal law alone, the Wisconsin Act cannot be upheld.

CONCLUSION

On behalf of the American Federation of Labor and for the reasons advanced herein and by petitioners in their briefs, it is submitted that the Wisconsin statute is in violation of Article I, Section 8 and Article VI of the Federal Constitution and the Fourteenth Amendment. With particular reference to 111.62 and 111.63, it is further submitted

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[11] *Hill v. Florida*, 325 U. S. 538.

[12] *LaCrosse Telephone Corp. v. Wisconsin Employment Relations Board*, 336 U. S. 18.

[13] *International Union of United Automobile, Aircraft and Agricultural Workers, etc., v. O'Brien*, 339 U. S. 454.

that these sections are also in violation of the Thirteenth Amendment to the Federal Constitution.

Respectfully submitted,

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